

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

B.U.I.L.D. Citizen Committee, Michelle
Heuer, Chairperson,

Complainants,

vs.

W.I.S.E., and Victor Niska, Chairperson,
Respondents.

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER

The above-entitled matter came on for an evidentiary hearing on March 3, 2006, before a panel of three Administrative Law Judges: Bruce H. Johnson (Presiding Judge), Beverly Jones Heydinger, and Kathleen D. Sheehy. The hearing record closed on April 11, 2006, with the filing of the parties' post-hearing briefs.

Michelle Heuer, 108 Maple Avenue, Waverly, Minnesota, 55390, appeared on behalf of Complainants B.U.I.L.D. Citizen Committee without legal counsel but with the assistance of Kendall Kubasch. William Mohrman, Mohrman & Kaardal, P.A., 33 South Sixth Street, Suite 4100, Minneapolis, MN 55402, appeared on behalf of Respondents W.I.S.E and Victor Niska, Chairperson.

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUE

Did Respondents violate Minn. Stat. § 211B.06, by preparing and disseminating campaign material with respect to the effect of a ballot question that was false and that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainants failed to establish that Respondents violated Minn. Stat. § 211B.06.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

Background

1. On December 13, 2005, voters in the Howard Lake, Waverly-Winsted (HLWW) School District (ISD 2687) were asked to vote on a \$25.6 million bond referendum to finance a new school building.

2. Complainant Michelle Heuer is the Chairperson of B.U.I.L.D., a citizens' group that supported passing the school bond referendum.

3. Respondent Victor Niska is the chairperson of W.I.S.E., which stands for "We Insist on Sound Education." Respondents Niska and W.I.S.E. opposed the school bond referendum.

4. Mr. Niska lives in the HLWW School District. From 1984 to 1996, Mr. Niska was employed by the Westonka School District as the Director of Facilities and Transportation.^[1] In that position, he was involved in construction projects and facilities maintenance for the Westonka School District. Currently, Mr. Niska is self-employed as an "owner's representative" for school districts, serving as a "communications link" between school districts and contractors or design professionals. Mr. Niska is not a licensed architect or general contractor.^[2]

5. Prior to December 13, 2005, Respondent Niska prepared and disseminated various pieces of campaign material urging voters to vote against the school bond referendum.

6. On December 13, 2005, voters rejected the school bond referendum by a vote of 1,193 to 1,157.

7. On January 6, 2006, Complainants Heuer and W.I.S.E. filed a complaint with the Office of Administrative Hearings against Respondents alleging they violated Minn. Stat. § 211B.06 by preparing and distributing false campaign material. The Complaint alleged 17 violations of Minn. Stat. § 211B.06.

8. By Order dated January 10, 2006, Administrative Law Judge Bruce Johnson determined that the Complaint set forth three prima facie violations of Minn. Stat. § 211B.06. The remaining 14 allegations were dismissed.

False Campaign Material – Tax Shift

9. On or about December 8, 2005, Respondent Niska prepared and distributed a campaign postcard to voters in the HLWW School District that contained the following statement: "Like most Minnesotans, HLWW taxpayers saw their tax support of schools shift from property taxes to state income taxes a few years ago."^[3]

10. School building projects are funded primarily through property taxes.^[4]

11. Recent changes in state law shifted some of the funding for school operating expenses from property taxes to state income taxes.^[5]

12. Respondents' statement that taxpayers in the HLWW School District saw their tax support of schools shift from property taxes to state income taxes is true as it relates to funding of school operating expenses.^[6]

13. On Respondents' motion at the close of the Complainants' case, the panel dismissed Complainants' allegation that Respondents' statement regarding a tax shift violated Minn. Stat. § 211B.06 because the panel concluded that the statement is not false.

False Campaign Material – Construction Delivery Method

14. Sometime in approximately late 2003, the HLWW School District began the process of choosing an architectural firm to design a new school building. The School District issued Requests for Proposals (RFPs) to various architectural firms, conducted interviews, and eventually narrowed the field of candidates down to two. After visiting other school district buildings and checking references, the School Board chose the architectural firm of Smiley, Glotter, Nyberg Architects, Inc. (SGN) to design the building.^[7]

15. The HLWW School District and SGN entered into a contract on August 16, 2004. The contract provides for a construction delivery method of Architect/General Contractor as opposed to a multi-prime contractor delivery method. That is, the contract provides that the School District will contract with the Architect and the General Contractor, and the General Contractor will select and hire the subcontractors.^[8]

16. Article 2.5.1 of the HLWW School District's contract with SGN governs construction procurement services and provides as follows:

The Architect shall, after consultation with the Owner, obtain competitive bids and shall provide recommendations to the Owner in awarding for construction. The Architect shall, with assistance from the Owner, prepare one single-prime contract for construction of each project. The Architect shall not be responsible for preparing multi-prime contracts for construction.^[9]

17. The School District preferred to contract with a General Contractor so that it would not have to "micromanage" all of the details with the various subcontractors.^[10] Pursuant to the terms of the contract, the General Contractor will select and hire the subcontractors.^[11] In general, subcontracts must be awarded to the lowest bidder.^[12] However, the contract provides that the School District may object to the hiring of a subcontractor if the District has "just cause."^[13] If the School District has reason to believe that a subcontractor had done poor work in the past or would be unable to post a bond, these may be sufficient grounds for "just cause."^[14]

18. The contract between the HLWW School District and SGN was based on a standardized document developed by the American Institute of Architects (AIA). The School District's attorney reviewed the contract and made some changes. The School Board approved the contract and Superintendent George Ladd signed the contract on behalf of the School District on August 16, 2004.^[15]

19. The contract between SGN and the HLWW School District provides for the formation of a Building Committee that will meet with the architect throughout the building process to make recommendations and voice any concerns.^[16] Typically, the architects meet with Building Committees every other week.^[17] The contract also contains several provisions that require SGN to consult with the School District during the development of construction documents, the bid process, and the provision of services.^[18]

20. Respondent Niska believes that if a School District does not have direct contractual relationships with the subcontractors, the School District has little control over them or their work. Mr. Niska believes that the better construction delivery method is for a School District to hire a construction manager and to contract directly with the subcontractors. According to Mr. Niska, if a School District contracts directly with the subcontractors it has more control over the "construction details, quality control and decisions."^[19]

21. Respondent Niska was concerned about the contract but otherwise supported the project. He approached Superintendent Ladd and one School Board member and offered to be the construction manager at no charge on the HLWW School District building project, but his offer was declined on November 22, 2005.^[20]

22. On or about December 8, 2005, the Respondents prepared and distributed a four page campaign document entitled "Howard Lake-Waverly-Winsted Public Schools 2005 Building Bond Vote." The document was dated November 24, 2005, and listed numerous concerns about the proposed school building's cost, design and materials. Included in the four page campaign document were the following statements:

The construction delivery method is decided to be a General Contractor, also agreed upon in the written contract. This will take the District out of the majority of the construction details, decisions and quality control.
...^[21]

23. The terms of the contract between the HLWW School District and SGN provide that the construction delivery method for the school building project will be a General Contractor method.^[22] However, as of the date of the hearing, the HLWW School District had not yet entered into a contract with a General Contractor.^[23]

24. It is estimated that the proposed school building construction project will cost approximately \$27 million.^[24]

False Campaign Material – Bribe

25. The same four page campaign document prepared and distributed by Respondent also included the following statement:

I have personally been offered a bribe by SGN Architect's – free tickets to the Twins game during the World Series.^[25]

26. Immediately after this statement, Respondents posed the following question: "What are they offering or have offered today when the Administration and Board members are so comfortable with SGN?"

27. In 1991, Respondent Niska was employed by the Westonka Public Schools in Mound, Minnesota as the Director of Facilities and Transportation. In that same year, the Westonka School Board established a Building Committee to address the Westonka School District's facility needs. Respondent Niska was a voting member and the chairperson of this Building Committee. Dr. Jim Smith, the Superintendent of the Westonka schools, was also a voting member of the Building Committee.^[26]

28. Shortly after the Westonka School District Building Committee was formed, the Committee began the process of selecting an architectural firm to work with the Westonka School District on designing a new school building. Eventually, the candidates were narrowed to EOS, an architectural firm based in Excelsior, and SGN.^[27]

29. The Building Committee makes a recommendation to the School Board as to which architectural firm should be hired, and its opinion carries a lot of weight with the School Board.^[28] The other members of the Building Committee included School District employees, School Board members, members of the public, and the architect.^[29]

30. As voting members of the Building Committee, Respondent Niska's and Superintendent Smith's views as to which architectural firm should be hired were important.

31. In October of 1991, one of the partners of SGN Architects had four tickets to game 6 of the World Series between the Minnesota Twins and the Atlanta Braves. Mr. Nyberg offered tickets to the game free of charge to Dr. Jim Smith, Superintendent of the Westonka School District and John Klein, Superintendent of Triton schools. Because SGN was bidding for work with both school districts, Mr. Nyberg offered the tickets to Dr. Smith and Mr. Klein in order to gain favor with them.^[30]

32. Ultimately, SGN was not selected as the architect for the Westonka School District project.^[31]

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.^[32]

3. Minn. Stat. § 211B.01, subd. 2, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.” The campaign postcard and four-page document that were prepared and distributed by Respondents are campaign material within the meaning of that statute.

4. Minn. Stat. § 211B.06, subd. 1, provides, in part:

“A person is guilty of a gross misdemeanor who intentionally participates in the preparation [or] dissemination ... of ... campaign material with respect to ... the effect of a ballot question, that is designed or tends to ... promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

5. The Complainants have failed to show shown by clear and convincing evidence that the Respondents violated Minn. Stat. § 211B.06, subd. 1, with respect to the three statements at issue in this case.

6. Respondents’ statement that HLWW taxpayers saw their “tax support of schools shift from property taxes to state income taxes a few years ago” is not a false statement of fact. Complainants failed to establish that Respondents violated Minn. Stat. § 211B.06 by preparing and/or disseminating campaign material that included this statement.

7. Respondents’ statement that the General Contractor construction delivery method chosen by the School District will “take the District out of the majority of the construction details, decisions and quality control” is an opinion and not a false statement of fact. Complainants failed to establish that Respondents violated Minn. Stat. § 211B.06 by preparing and/or disseminating campaign material that included this statement.

8. The Complainants failed to show by clear and convincing evidence that Respondent Niska’s statement that he was offered a bribe is false and that the statement is “with respect to the effect of a ballot question” as required by Minn. Stat. § 211B.06. The Complainants failed to establish that Respondents violated Minn. Stat. § 211B.06 by preparing and/or disseminating campaign material that included this statement.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel makes the following:

ORDER

IT IS ORDERED: That the Complaint against Respondents W.I.S.E. and Niska is DISMISSED.

Dated: April 20, 2006

/s/ Bruce H. Johnson

BRUCE H. JOHNSON
Presiding Administrative Law Judge

/s/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

False Campaign Material

Minn. Stat. § 211B.06 prohibits the preparation or dissemination of false campaign material with respect to the effect of a ballot question. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard as to whether it is false. The Complaint alleged that 17 statements in campaign material prepared and/or disseminated by the Respondents are false and that Respondents either knew the statements were false or communicated them with reckless disregard as to whether they were false. After an initial review of the Complaint, the Presiding Administrative Law Judge determined that only three statements set forth prima facie violations of Minn. Stat. § 211B.06.

The Minnesota Supreme Court has observed that the prohibition against false campaign material is “directed against the evil of making false statements of fact” and not against criticisms or unfavorable deductions based on fact.^[33] Even inferences that are “extreme and illogical” do not come within the purview of the statute so long as they

are based on fact.^[34] When distinguishing between fact and opinion, a challenged statement's specificity and verifiability, as well as its literary and public context, are factors to be considered.^[35] The statement that must be proved false is not necessarily the literal phrase published but rather what a reasonable reader would have understood the author to have said; expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand the statement is not a representation of fact.^[36] The panel will discuss each of the three statements below.

1. "Like Most Minnesotans, HLWW taxpayers saw their tax support of schools shift from property taxes to state income taxes a few years ago."

At the close of the Complainants' case, the panel granted Respondents' motion to dismiss Complainants' allegation that this statement violated Minn. Stat. § 211B.06. Complainants failed to establish that the statement is false. In fact, Complainants' own witness, Brad Lundell, admitted that the statement was true as it relates to school operating expenses. However, because the referendum at issue concerned a school building project and not operating expenses, Mr. Lundell found the statement to be misleading. Minn. Stat. § 211B.06 is directed against false statements of fact, not against misleading statements. While the statement is inapplicable to the school building bond issue and may, as a result, be misleading, it is not false. Accordingly, the allegation with respect to this statement is dismissed.

2. "The construction delivery method is decided to be a General Contractor, also agreed upon in a written contract. This will take the District out of the majority of the construction details, decisions, and quality control."

The contract between the HLWW School District and SGN Architects provides that the construction delivery method for the school building project will be an Architect/General Contractor method as opposed to a multi-prime contractor delivery method. That is, the School District will contract directly with the Architect and the General Contractor and the General Contractor will select and hire the subcontractors. As of the date of the hearing, however, the School District had not yet entered into a contract with a General Contractor.

The Complainants argue that, contrary to the Respondents' statements, the contract between the School District and SGN ensures that the School District will maintain control over the majority of the construction details, decisions, and quality control throughout the building process. In support of their argument, the Complainants point to numerous provisions in the contract where phrases such as "after consulting with the owner [School District]" or "upon owner approval" are used. In addition, the Complainants emphasize that the contract provides for the formation of a Building Committee that will meet regularly with the Architect once the construction begins. The Complainants insist that, based on the language of the contract, the School District will remain "involved in a decision-making capacity" throughout the construction process regardless of the construction delivery method chosen.

The panel concludes that, like the statements at issue in *Kennedy v. Voss*,^[37] the statements regarding the construction delivery method reflect Respondents' opinion and do not come within the purview of section 211B.06. Because the School District has not yet signed a contract with a General Contractor, Respondents' statement that a General Contractor arrangement will take the School District out of the majority of the construction details and decisions represents an inference or opinion based on Mr. Niska's past experience as a school district facilities manager. The statements are not false statements of fact but instead reflect Respondents' belief that by not contracting directly with the sub-contractors, the School District will have little control over the majority of the construction details. The Complainants have failed to show by clear and convincing evidence that the statements are false statements of fact in violation of Minn. Stat. § 211B.06. Accordingly, this allegation is dismissed.

3. "I have personally been offered a bribe by SGN Architects – free tickets to the Twins game during the World Series."

The burden of proving the allegations contained in the Complaint is on the Complainants and the standard of proof of a violation of Minn. Stat. § 211B.06 is clear and convincing evidence.^[38] The word "bribe" has been defined as "something serving to influence or persuade."^[39] Minn. Stat. § 211B.13, which prohibits bribing persons to induce them to vote in a particular way, defines "bribery" in part as the giving of money, food, entertainment or other thing of monetary value. If Mr. Nyberg offered to give Respondent Niska a ticket to the World Series game in order to gain favor with him and induce him to select SGN as the architectural firm for the Westonka Schools project, the World Series ticket could reasonably be interpreted as a "bribe." Mr. Nyberg admitted he offered tickets to other School District staff in an attempt to gain their favor, but denied he offered a ticket to Respondent Niska.

Given the high standard of proof in these claims, Mr. Nyberg's testimony alone, when considered in light of Respondent Niska's testimony, is not sufficient to establish by clear and convincing evidence that Respondents' statement is false. Moreover, Minn. Stat. § 211B.06 prohibits the dissemination of false campaign material with respect to the "effect" of a ballot question. The Complainants failed to establish how this statement, even if false, relates to the "effect" of the school bond referendum. Clearly Respondents' statement was meant to defeat the referendum by impugning the integrity of SGN and possibly the School Board,^[40] but the record does not establish how such an accusation goes to the "effect" of the referendum.

For both of these reasons, the panel concludes that the Complainants have failed to establish by clear and convincing evidence that Respondents Niska and W.I.S.E. violated Minn. Stat. § 211B.06 with respect to this statement. Therefore, this allegation is dismissed.

B.H.J., B.J.H., K.D.S.

^[1] Ex. 4-16; Testimony of Niska.

- ^[2] Testimony of Niska.
- ^[3] Campaign Complaint Ex. 3.
- ^[4] Testimony of Lundell.
- ^[5] Testimony of Lundell.
- ^[6] Testimony of Lundell.
- ^[7] Testimony of Ladd and Doering.
- ^[8] Testimony of Ladd and Niska; Ex. 2.
- ^[9] Strikeouts and underlines omitted.
- ^[10] Testimony of Doering.
- ^[11] Testimony of Doering.
- ^[12] Testimony of Nyberg.
- ^[13] Testimony of Nyberg.
- ^[14] Testimony of Nyberg.
- ^[15] Testimony of Ladd and Nyberg; Ex. 2.
- ^[16] Testimony of Ladd and Nyberg.
- ^[17] Testimony of Nyberg.
- ^[18] Testimony of Ladd and Nyberg; Ex. 2. See Article §§ 2.4.4.2, 2.5.1, 2.6.1.3, and 2.6.5.1.
- ^[19] Testimony of Niska.
- ^[20] Testimony of Niska.
- ^[21] Campaign Complaint Ex. 4.
- ^[22] Testimony of Ladd and Niska; Ex. 2.
- ^[23] Testimony of Doering.
- ^[24] Testimony of Ladd.
- ^[25] Campaign Complaint Ex. 4.
- ^[26] Testimony of Niska: Ex. 4-16.
- ^[27] Testimony of Niska; Ex. 4-16.
- ^[28] Testimony of Nyberg and Niska.
- ^[29] Testimony of Niska.
- ^[30] Testimony of Nyberg.
- ^[31] Testimony of Niska.
- ^[32] Minn. Stat. § 211B.32, subd. 4.
- ^[33] *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981) (discussing predecessor statute, Minn. Stat. § 210A.04).
- ^[34] 304 N.W.2d at 300.
- ^[35] *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).
- ^[36] *Jadwin v. Minneapolis Star and Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).
- ^[37] 304 N.W.2d 299 (Minn. 1981).
- ^[38] Minn. Stat. § 211B.32, subd. 4.
- ^[39] American Heritage Dictionary (3rd ed. 1997) at 174.
- ^[40] The sentence following this statement reads: "What are they offering or have offered today when the Administration and Board members are so comfortable with SGN?"